

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD A. PELULLO,
APPELLANT,

v.

SUNBANK/MIAMI, N.A. ET AL.,
APPELLEES.

CIVIL ACTION

NO. 97-2052

NO. 97-2053

MEMORANDUM

Broderick, J.

June 26, 1997

On May 13, 1997, this Court issued a Memorandum and Order dismissing the above-captioned bankruptcy appeals for lack of jurisdiction because the Appellant filed his notices of appeal one day late under Bankruptcy Rule 8002(a). See 1997 WL 260207, Bankr. L. Rep. ¶77,363 (E.D. Pa. May 13, 1997). On May 23, 1997, Appellant filed a motion for reconsideration of this Court's May 13th Memorandum and Order. After reconsideration, the Court has determined for the reasons set forth below that Appellant has failed to present any reason to justify altering or amending the Court's Memorandum and Order of May 13, 1997, and the Memorandum and Order of May 13, 1997 will remain in full force and effect.

The Court has summarized the facts and procedural history of these appeals in its Memorandum and Order of May 13, 1997, and will do so again only to the extent necessary to reconsider that order. Appellant commenced these appeals on February 19, 1997 with the filing of two notices of appeal for orders entered on

February 5, 1997 and February 7, 1997 by Bankruptcy Judge Thomas M. Twardowski, who sits in the Reading, Pennsylvania division of the United States Bankruptcy Court for the Eastern District of Pennsylvania. These notices of appeal were filed one day late under Bankruptcy Rules 8002(a) and 9006(a), and thus this Court dismissed the appeals because it could not exercise its bankruptcy appellate jurisdiction over them. 28 U.S.C. § 158(a); Bankruptcy Rules 8001, 8002. See 1997 WL 260207, at *2.

Appellant concedes that his appeals were untimely filed. However, in his motion for reconsideration, he contends that the appeals should be considered timely under the "unique circumstances" doctrine first enunciated by the United States Supreme Court in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962). Under this doctrine, a litigant who fails to file a timely appeal because of an erroneous ruling or assurance by a judicial officer may still perfect his appellate rights by appealing within the period extended by the court. Carlisle v. United States, 116 S. Ct. 1460, 1467 (1996) (citing Thompson v. INS, 375 U.S. 384 (1964)); Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989).

In his motion for reconsideration, Appellant explains for the first time why his appeals were not timely filed. Appellant never filed responses to Appellees' motions to dismiss for lack of jurisdiction. Instead, after the period for filing a response to one of the motions had expired under Local Rule of Civil Procedure 7.1, Appellant requested additional time to respond to

the motions. The Court denied Appellant's motion for additional time to respond to the motions to dismiss in its Memorandum and Order dated May 13, 1997 on the grounds that the Court had no jurisdiction over untimely filed bankruptcy appeals.

For the first time, Appellant now contends that he attempted to file his notices of appeal in the Philadelphia bankruptcy clerk's office on February 18, 1997, the day they were due. Appellant claims that one of the intake clerks there told Appellant's courier that the notices had to be filed in Reading because the cases were listed before Judge Twardowski, who sits in Reading. Then, Appellant sent the notices of appeal to Reading via overnight delivery, where they were docketed on February 19, 1997, one day after time had expired for filing the notices of appeal under the bankruptcy rules.

Appellant also contends that the bankruptcy clerk's office in Reading informed him on February 19, 1997 that the Reading office had received and docketed his notices of appeal that day. Relying on the "unique circumstances" doctrine, Appellant urges this Court to reconsider its order dismissing his appeals as untimely on the grounds that the intake clerk in Philadelphia erroneously refused to accept his notices of appeal.

Appellant's filing of his notices of appeal one day late cannot be excused under the "unique circumstances" doctrine, which has been strictly interpreted in recent years by the Supreme Court and Third Circuit. See Kraus v. Consolidated Rail Corp., 899 F.2d 1360, 1363-65 (3d Cir. 1990). Nothing in

Appellant's explanation for his untimely filings indicates that he relied on an erroneous ruling or assurance of a judicial officer, as required by the Supreme Court in Osterneck and its other cases, supra.

Moreover, the bankruptcy clerk's office in Philadelphia did not err when it told Appellant's courier that his notices of appeal had to be filed in Reading. Under Local Bankruptcy Rule 1002.2, bankruptcy petitions and adversary proceedings are filed in Philadelphia. Once a case is opened, all subsequent documents, including notices of appeal, should be filed in the clerk's office where the case is assigned, which in this case was Reading. It is the Court's understanding of the bankruptcy court's policy, however, that notices of appeal will be accepted and docketed if the intake clerk is told that the notices of appeal must be filed that day. According to Appellant's brief and affidavit filed in support of his motion for reconsideration, Appellant did not advise the clerk in Philadelphia that the notices had to be filed on February 18, 1997.

As this Court noted in its Memorandum and Order of May 13, 1997, the ten-day period for filing bankruptcy appeals "is strictly construed. The failure to file a timely notice of appeal creates a jurisdictional defect barring appellate review." Shareholders; Sheridan Broadcasting Corp. v. Sound Radio, Inc., 109 F.3d 873, 879 (3d Cir. 1997) (citing In re Universal Minerals, Inc., 755 F.2d 309, 311-12 (3d Cir. 1985)). As heretofore discussed, Appellant never filed responses to

Appellees' motions to dismiss for lack of jurisdiction.

Furthermore, Appellant did not seek an extension of time from the bankruptcy court for filing his notices of appeal. The bankruptcy rules permit an extension of time for filing a notice of appeal in limited circumstances upon a showing of "excusable neglect." Bankruptcy Rule 8002(c); cf. Wells v. Wells, 87 B.R. 862, 866 (Bankr. E.D. Pa. 1988) (Twardowski, J.) (finding excusable neglect where counsel had been "less than perfectly diligent" but "acted promptly and in good faith"). However, such a request must be made within 20 days after the expiration of the time for filing the notice of appeal. Id. Thus, since Appellant did not avail himself of this avenue for relief, he cannot receive an extension of time now even if he could show "excusable neglect." Shareholders, 109 F.3d at 879.

The foregoing circumstances of Appellant may be unfortunate, but they are hardly "unique" justifying application of the "unique circumstances" doctrine. Accordingly, having reconsidered its Memorandum and Order of May 13, 1997, this Court's Memorandum and Order of May 13, 1997 dismissing the appeals for lack of jurisdiction will remain in full force and effect.

An appropriate Order follows.

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ORDER

AND NOW, this ____th day of June, 1997; Appellant having filed on May 23, 1997 a motion for reconsideration of this Court's Memorandum and Order of May 13, 1997; after reconsideration, the Court having determined for the reasons set forth in the Court's Memorandum of this date that Appellant has failed to present any reason to justify altering or amending the Court's Memorandum and Order of May 13, 1997;

IT IS ORDERED: The Court's Memorandum and Order of May 13, 1997 shall remain IN FULL FORCE AND EFFECT.

IT IS FURTHER ORDERED: The motion of Sunbank/Miami, N.A. (Document No. 12), entered on May 20, 1997, to suspend the briefing schedule is DISMISSED AS MOOT.

RAYMOND J. BRODERICK, J.